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TABLE OF CONTENTS

	Page
Opinion of the Circuit Court of Appeals	1
Grounds of jurisdiction	1
Statement of the case	3
The facts	5
Specifications of error	8
Summary of argument	9
Argument	13
I. Section 7 of the Clayton Act and its construction	13
II. Section 11 and the order it authorizes for enforcement of compliance with section 7 of the Clayton Act	17
III. Respondent should not be allowed to take advantage of its violation of law	25
IV. The acts and practices of respondent as found by the Commission, and confirmed by the Court, constitute unfair methods of competition, in interstate commerce and of themselves justify the order under consideration	27
V. The order to divest the stock of the Nevada Packing Company, including the plant and property of the company, involves no exercise of legislative power	30
VI. The order involves no exercise of the judicial power of the United States within the meaning of the Constitution	31
Conclusion	34

TABLE OF CASES

Aluminum Company v. *Federal Trade Commission*, 284 Fed. 401	17
Continental Wall Paper Co. v. *Voight & Sons Co.*, 212 U. S. 227, 262	24
Federal Trade Commission v. *Beech-Nut Packing Company*, 257 U. S. 441, 453	27
Gordon v. *United States*, 117 U. S. 696	33
Hayburn's Case, 2 Dal. 409	33
Interstate Commerce Commission v. *Goodrich Company*, 224 U. S. 194, 214	30
Little v. *Fleischman et al.*, 98 S. E. 455, 458	26

	Page
Louisville & Nashville Railroad Company v. *Garret*, 231 U. S. 298, 307	31
Mennen Company v. *Federal Trade Commission*, 288 Fed. 776, 782	19
Murray et al. v. *Hoboken Land Improvement Company*, 18 How. 280, 284	31
National Harness Manufacturers Association v. *Federal Trade Commission*, 268 Fed. 705	28
National Pole Company v. *Chicago & Northwestern Railway Co.*, 211 Fed. 65	31
Pennsylvania Railroad Co. v. *International Coal Co.*, 230 U. S. 134	31
Thatcher Manufacturing Company v. *Federal Trade Comsion*, 5 Fed. 2nd, 615, 621	27
Wholesale Grocers Association of El Paso v. *Federal Trade Commission*, 277 Fed. 657, 664, 665	28
Union Bridge Company v. *United States*, 204 U. S. 365	31
United States v. *American Tobacco Co.*, 221 U. S. 106, 188	23
United States v. *Cement Securities Co. et al*, 238 U. S. 588	24
United States v. *Corn Products*, 234 Fed. 964	24
United States v. *Ferreira*, 13 How. 40	33
United States v. *Grimaud*, 220 U. S. 506, 509	31
United States v. *Milwaukee Refrigerator Transit Co.*, 142 Fed. 247, 255	21
United States v. *Standard Oil Co.*, 221 U. S. 182	23
United States v. *Union Pacific Railroad Co.*, 226 U. S. 96	24
United States v. *U. S. Shoe Machinery Co.*, 274 Fed. 127, 141. 143	20
United States v. *U. S. Steel Corporation*, 223 Fed. 55, 61, 62	29

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 96

FEDERAL TRADE COMMISSION, PETITIONER

v.

WESTERN MEAT COMPANY, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

OPINION OF THE CIRCUIT COURT OF APPEALS

The opinion of the Court below is found in 4 Fed. (2nd) 223. It also appears at pp. 614 to 615 of the printed transcript.

GROUNDS OF JURISDICTION

This was a petition by the Western Meat Company (hereinafter called the Respondent) to the Circuit Court of Appeals for the Ninth Circuit to review an Order of the Federal Trade Commission

(hereinafter called Petitioner) entered under authority of section 5 of an "Act to Create a Federal Trade Commission to define its powers and duties, and for other purposes," commonly known as the "Federal Trade Commission Act" (38 Stat. 719), and of sections 7 and 11 of an "Act to supplement existing laws against unlawful restraint and monopolies, and for other purposes," commonly known as the "Clayton Act" (38 Stat. 730). The jurisdiction of the Court below was invoked under section 5 of the Federal Trade Commission Act as well as under section 11 of the Clayton Act. The Court below on September 3, 1924, entered a decree denying the petition for review and in effect affirming the Order of the Federal Trade Commission (Petitioner here). Such opinion of the Court appears at pages 604 to 610 of the printed transcript. Thereafter, on February 17, 1925, the Court below entered, on rehearing, another decree modifying the second paragraph of the Order of the Federal Trade Commission (Petitioner here). (R. 614, 615.)

Jurisdiction of the Court is invoked under section 5 of the Federal Trade Commission Act (38 Stat. 719), and section 11 of the Clayton Act (38 Stat. 730), and also under section 240 of the Judicial Code as amended by the Act of February 13, 1925 (*Fed. Tr. Com.* v. *Gratz,* 253 U. S. 421).

STATEMENT OF THE CASE

This case is here on Certiorari, for review of a decree of the Circuit Court of Appeals for the Ninth Circuit, entered February 17, 1925, modifying an Order of the Federal Trade Commission (Petitioner here), entered after due hearing, in its proceeding charging Respondent with violation of section 5 of the Federal Trade Commission Act (38 Stat. 719), and of section 7 of the Clayton Act (38 Stat. 730), by the acquisition on December 30, 1916, of the capital stock of the Nevada Packing Company, and the elimination of substantial competition, in interstate commerce, theretofore existing between Respondent and said Nevada Packing Company, in the purchase of cattle, sheep, and hogs, and the sale of meats and meat products arising from their slaughter.

The pertinent parts of the Order are as follows:

> NOW, THEREFORE, IT IS ORDERED, that the respondent, Western Meat Company, shall forthwith cease and desist from violating the provisions of Section 5 of said Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and also the provisions of Section 7 of said Act of Congress approved October 15, 1914, entitled, "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," and particularly to so divest itself absolutely of all capital stock of the

Nevada Packing Company as to include in such divestment the Nevada Packing Company's plant and all property necessary to the conduct and operation thereof as a complete, going packing plant and organization and so as to neither directly or indirectly retain any of the fruits of the acquisition of the capital stock of said Nevada Packing Company, a corporation.

IT IS FURTHER ORDERED, that in such divestment no stock or property above mentioned to be divested shall be sold or transferred, directly or indirectly, to any stockholder, officer, director, employee, or agent of, or anyone otherwise directly or indirectly connected with or under the control or influence of respondent or any of its officers, directors, or stockholders or the officers, directors or stockholders of any of respondent's subsidiaries or affiliated companies. (R. 599 to 601.)

The material part of the decree which it is sought to review is as follows:

On consideration whereof, it is now here ordered and adjudged by this Court that the said order of the said Federal Trade Commission be, and the same hereby is, modified as to eliminate therefrom the injunction against the acquisition by the petitioner of the plant and property of the Nevada Packing Company, and in all other respects, the petition to review the order of the said Federal Trade Commission be, and hereby is, denied. (R. 614.)

THE FACTS

There is no controversy over the facts. They have been determined by the Court below, as settled by the Commission. Reference to certain facts, in evidence, but only indirectly reflected in the Findings, though undisputed, illuminates the situation confronting Petitioner when it issued the Order in question. It appears that when acquired by the Western Meat Company December 30, 1916, the stock of the Nevada Packing Company was purchased in the name of one Albert Raymond, an attorney of the Swift interests at San Francisco, and though he immediately endorsed the stock to the Respondent, there was no transfer on the books of the Nevada Packing Company. On November 9th, 1917, so far as such books are concerned, Raymond was still credited with the ownership of all of its stock except five shares. (R. 419.) A report of Respondent to Petitioner December 27, 1918, practically two years after the acquisition of the stock of the Nevada Packing Company, indicated that it was still held in the name of this individual. (R. 465.)

The Respondent owns the whole or a substantial part of the capital stock of numerous corporations engaged in the same, or an allied, business, and the interests in every instance here disclosed appear to be held by some member of the Swift family or by someone directly or indirectly under the control or influence of Respondent, or the Swift interests.

(R. 465, 466.) At the time of the acquisition of the stock of the Nevada Packing Company by Respondent the latter was controlled by Mr. Louis F. Swift of Chicago, president of Swift and Company, meat packers. He, together with other stockholders of Swift and Company, owned approximately 45 per cent of the stock of the Western Meat Company and 35 per cent of its stock, approximately, belonged to officers of Armour and Company, Morris and Company, Cudahy and Company, or some member or members of the Armour, Morris, and Cudahy families, or officers or stockholders of their respective companies. The dominant factors in the meat-packing industry were therefore represented by substantial interests in the Western Meat Company. (R. 447, 462.)

The stock of the Nevada Packing Company was acquired by the Respondent after Armour and Company had been consulted, and had acquiesced in the contemplated purchase (R. 546), although the Nevada Packing Company represented Armour and Company in the sale and distribution of its smoked meats in the territory covered by the Nevada Packing Company, and such business constituted 25 per cent of its yearly aggregate. Louis F. Swift directed the Western Meat Company's business from Chicago, and after purchasing the stock of the Nevada Packing Company instructed the manager of the Western Meat Company so to arrange that the Nevada Packing Company would

be similarly directed. It was thereafter so conducted by Mr. Swift from Chicago through the agency of the Western Meat Company in such way as to subserve the interest of Respondent and therefore of the big packers who owned it. (R. 553, 560.)

At the same time the business of the Nevada Packing Company was conducted under its own name, however, and ostensibly as an independent concern but the Commission found that as a part of the business of the Western Meat Company it began after acquisition of the stock of the Nevada Packing Company to serve, and thereafter it did serve, substantially all of the trade that was formerly served by the Nevada Packing Company before the acquisition of its stock by Respondent. (R. 596, 597.)

There was substantial competition in interstate commerce between the Western Meat Company and the Nevada Packing Company and by means of its acquisition of the stock of the latter by the former this competition was entirely eliminated (R. 566, 570, 571, 597).

This prohibited effect was accomplished, in part, by the maintenance of an appearance of competition between the two companies, although the employees or servants of Respondent were placed in charge of the Nevada Packing Company (R. 168, 169, 188, 273, 556), and certain of the territory usually covered by the former was allotted to the

latter (R. 557, 570), and salesmen of Respondent were warned to refrain from stating to the trade that the Respondent controlled Nevada Packing Company (R. 569).

The evidence reveals no acquisition of the physical assets or properties of the Nevada Packing Company by the Western Meat Company except through the ownership and control of the capital stock acquired as aforesaid, but in oral arguments and briefs Respondent has asserted its right, and, in effect, proclaimed its purpose to purchase the plant and property of the Nevada Packing Company and thereupon cause its dissolution.

There is no evidence that the Respondent acquired the Nevada Packing Company for investment, and the Court below has held that the purpose was entirely different. (R. 609, 10.) Nor is there any evidence whatever that the company so acquired was intended as a subsidiary, or its plant and property as a branch or extension of the Western Meat Company, until possibly after extinction of the competition then existing, when pretense of separate and independent production could be discarded as no longer necessary or useful.

SPECIFICATIONS OF ERROR

First, the Court erred in holding that the Clayton Act confers no other authority on the Federal Trade Commission for enforcement of compliance with section 7 than the authority to command an offending corporation to desist from holding

stock in another corporation in violation of its provisions.

Second, the Court erred in holding that there is no authority conferred by the Federal Trade Commission Act to require the Western Meat Company (Respondent here) to do more than divest itself of its stock in the Nevada Packing Company.

Third, the Court erred in modifying the Order of the Federal Trade Commission so as to eliminate therefrom its prohibition against the acquisition by the Western Meat Company (Respondent here) of the plant and property of the Nevada Packing Company.

Fourth. The questions presented for consideration may be embodied in the one general assignment whether the Federal Trade Commission, in circumstances here disclosed, had the authority under section five of the Federal Trade Commission Act, and section eleven of the Clayton Act, or either of them, to require divestment by Respondent of the stock of the Nevada Packing Company, and its plant and property held, controlled, and operated by Respondent through use of such stock, acquired in violation of section 7 of the Clayton Act.

SUMMARY OF ARGUMENT

Congress passed the Clayton Act to reinforce the antitrust law, and particularly to extinguish, in their incipiency, any and all movements or tendencies to lessen competition, or otherwise restrain

trade or contribute to monopoly. Utterances of those in charge of the measure, before its enactment, and indeed of all practically who advocated its passage in the Congress, manifested keen appreciation of the formidable part played in the suppression of competition and development of monopoly, by the apparent immunity, with which corporations, engaged in commerce, had acquired the control of one or more of their competitors. While this practice was often attended by secrecy, because of difficulties encountered or expected in the attempted purchase, it was the acquisition itself, whether secretly or openly effected, which initiated or tended to initiate the obnoxious movement or tendency. While an acquisition shrouded in secrecy and followed by a false and simulated appearance of continued competition was considered an aggravation of the vicious practice, it was only one aspect of a prevalent economic evil with which Congress sought to deal.

It had developed through a series of actions under the Sherman Law that the only effective means by which illegal combinations could be dissolved, entailed such disintegration of the units or properties of the combinations, as would absolutely prevent their reconcentration, for revival of the forbidden activities. The various decrees of the courts, therefore, specifically directed the disposition to be made of physical properties, as well as stock which had been utilized in furthering the purposes of the illegal combinations. This Court in two epochal

decisions, the Standard Oil and American Tobacco Company cases, gave its approval to the doctrine that the right of property yielded no privilege of using it in disobedience to law and that there inhered in the authority to prevent and restrain violation of the antitrust laws, the authority to require such disposition of property illegally employed, as would prevent recurrence of the violation.

Congress enacted the Clayton law in the light of these conditions, and when in section eleven it authorized the Federal Trade Commission to enforce compliance with section seven of the Act, which forbids a corporation engaged in commerce from acquiring the capital stock of a competitor in commerce, where the effect would probably be the substantially lessening of competition between the two corporations, it must be credited with due knowledge of the conditions and with the purpose to clothe the Commission with the power to issue an effective order.

Such an order must necessarily embrace all that the stock to be divested represents or reflects Otherwise, the substance will be retained by an offender, while merely the shadow is surrendered. It must be assumed that no such vain or useless order was intended by Congress.

Inclusion of the plant and property of the Nevada Packing Company in the Order of Divestment affects no more profoundly or intimately the rights of the respondent than would an order re-

quiring divestment of stock only; and the order here involves neither the exercise of legislative nor judicial power within the meaning of the Constitution.

The facts are undisputed. Respondent engaged in an unlawful enterprise and eliminated substantial competition. This the Court itself emphasizes, so that nothing arises here except the character and scope of the order.

The Commission found, and the Court sustained it, that respondent by its violation of Section seven, and its operation of the plant of the Nevada Packing Company, and elimination of competition, engaged in an unfair method of competition. Thus, there was more than violation of section seven of the Clayton Act, to wit, operation of the plant as an independent competitor, when in fact controlled by respondent, and operated by its servants and employees, and in such way as to destroy preexisting competition between them. The Commission was therefore authorized, apart from any construction of the word "stock" in Section Eleven, to require discontinuance in the ownership and use of the Plant and property of the Nevada Packing Company by respondent, whether under the cease-and-desist clause of section seven of the Clayton Act or Section five of the Federal Trade Commission Act.

There is no semblance or pretense of it, in the record, of any act or purpose by respondent, which

can justify application to this case of the provisions of the third paragraph of Section seven of the Clayton Act. The purpose of respondent in its violation of section seven, as to which there is no issue here, was declared by the Court to be the elimination of the competition theretofore existing between it and Nevada Packing Company. Whatever right Respondent may have had, before December 30th, 1916, to acquire the plant of the Nevada Packing Company was forfeited by its subsequent acquisition of the capital stock of the latter in violation of law, and if allowed to purchase it now, sanction is given to continuance of an unlawful scheme for restraint of trade, in the industry in Nevada and California, by uninterrupted cooperation between Respondent's plant in California, and the Nevada Packing Company's plant in Nevada, which had its basis in, and owes its development, strength, and possibilities to, the acquisition of capital stock of Nevada Packing Company, which the Court denounces as a violation of law.

ARGUMENT

I

Section seven of the Clayton Act and its construction

The first paragraph of Section 7 is as follows:

That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the

effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

We are concerned in the instant case not only with the restraint of trade in a section or community but with the acquisition by respondent of a competitor in interstate commerce, with the effect that all competition between them was eliminated. The above paragraph specifies three effects, any one of which is sufficient to bring the transaction within its inhibition.

Congress is presumed to have enacted the Clayton law with intelligent appreciation of the views of this Court in regard to the interpretation and enforcement of the Sherman Act. Its prohibition avoids generic terms and includes no words or phrases of doubtful meaning or on which the common law or judicial decision has imposed a definite significance apart from popular use, except perhaps "monopoly."

There is nothing general here. The things to be prevented are particularized. Congress recognized the unquestionable fact that acquisition by corporations in commerce, of competitors also engaged in commerce, had proved a potent method in the restraint of trade and the growth of monopoly. It refused to leave to the Courts the exercise of any judgment concerning the wisdom or reasonableness

of its prohibitions. It declared another policy in addition to that represented by the Sherman Act and itself decided that a corporation in commerce shall not acquire the capital stock of another corporation also in commerce where the effect may be to substantially lessen competition between them. It has rendered unnecessary any resort by the Courts to the standard of reason or any other process of construction than allowance of the ordinary meaning or significance the words in section seven have in the English language, by placing its ban upon the acquisitions in question where they will probably substantially lessen competition between the acquiring and acquired corporations.

Only passing notice need be given to the contention that section seven was intended only to prevent secret combinations, or secret acquisitions of stock in and control of competitors, or to preclude the operations of so-called "Bogus Independents."

There is no process or rule of construction by which the application of section seven of the Clayton Act can be confined merely to secret acquisitions of stock. The language is plain, and unmistakably discloses its real purpose. If it were otherwise so that resort to the debates in Congress might be advisable for enlightenment, there is nowhere to be found in such debates any suggestion whatever that the purpose of the section is so narrow or circumscribed. Certainly this was one of the purposes, but there was also a determination which

would obviously have been pursued further, if constitutional restraints had not arrested it, to prevent corporations engaged in commerce from acquiring the stock of competing corporations. There was no restraint on the power of Congress, however even remote to prevent such acquisition if its probable effect would be to substantially lessen competition in interstate commerce and Congress exercised its power. It would have qualified the comprehensive language employed, if it had aimed only at secret acquisitions or " Bogus Independents " and effort to restrict the application of the Act, by isolated utterances in course of debate, involves processes of construction condemned by Court. It had been the experience that suppression of competition and attainment of monopoly had in many instances in this country been effected openly and notoriously through the holding company and to construe this Act to mean that such results are not obnoxious thereto if produced openly and publicly and that they offend the Act only when brought about through secret acquisitions of stock in competing companies, is to ignore the colossal evil which inspired the agitation resulting finally in its adoption of the Act of Congress.

II

Section eleven and the order it authorizes for enforcement of compliance with section seven of the Clayton Act

The portion of section 11 of the Clayton Act dealing with the order through which the Commission may enforce compliance reads as follows:

> If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order.

It will be noted that it expressly authorizes an order to cease and desist from violation of the Act and to divest of the stock acquired in contravention of its provisions. It further expressly empowers the Commission to prescribe the manner and fix the time in which the order it enters must be carried out. In the case of the *Aluminum Company* v. *Federal Trade Commission* (284 Fed. 401) the order therefore of the Commission was far reaching in its terms and forbade practically every conceivable means by which the Aluminum Com-

pany might evade its effect by indirect acquisition of the stock it was required to surrender. The Aluminum Company sought and was denied rehearing by the United States Circuit Court of Appeals for the Third Circuit, and thereupon its petition for certiorari to the Circuit Court of Appeals was refused by this Court. While, of course, this refusal was no affirmance of the decree of the Circuit Court of Appeals, it certainly implied that the petition presented no such probability of error and suggested no question of sufficient potency as to impress this Court with the desirability of a review. In other words, it appeared to the Circuit Court of Appeals, and presumably to this Court, that authorization of section 11 to require divestment of the stock unlawfully obtained and to provide the manner therefor necessarily implied, if it did not clearly express, authority to so detail the way in which the divestment should be effected, that it would be impossible for the Aluminum Company either to feign a divestment or in any manner become revested contrary to the spirit and purpose of the Act. Here the Court below, while holding as a general proposition that the Commission exceeded its power in ordering a divestment of the plant and property, expressly declined to review that portion of the order and proceeded to modify the portion which the logic as well as law involved should have allowed to conform to the order of divestment.

If the order requiring divestment of the plant and property is sound then the Commission was authorized to safeguard a proper order with appropriate precautions. If in excess of the authority of the Commission to order divestment of the physical property, then there is no conceivable explanation for the refusal of the Court either to modify the order in that particular, except that Respondent from the inception of the transaction here examined, to the intervention of the Commission, ignored in every respect, save its conduct of an ostensible competition, the corporate entity of the Nevada Packing Company. The Court was unwilling to bestow its sanction on the use of capital stock of Nevada Packing Company purchased and held in violation of law, to purchase the property in question, and left undisturbed the order of the Commission to divest. The evidence here revealed clearly to the Court the transparency of the corporate veil which separated Swift and Respondent from the plant and property of the Nevada Packing Company. In *Federal Trade Commission* v. *Menzies Company* (288 Fed. 776, 782), the Court said:

> For some purposes a corporation is distinct from the members who compose it. But that distinction is a fiction of the law and the courts disregard the fiction whenever the fiction is urged to an intent and purpose which is not within its reason and policy and in such a case as this the reason can not be invoked.

So here the reason or policy underlying corporate existence has no application. There is nothing here involved concerning the succession of tenures or rights, nothing in the operations of the Nevada Packing Company directed or conducted by Swift and employees and servants of Swift and Company and the Western Meat Company which seemed to have necessitated a corporate medium except the execution of its purpose to deceive the public into the belief that the Nevada Packing Company was a separate and independent concern. There is therefore nothing here which demands application of the reason or policy upon which corporate creations are predicated. Just as the courts will see through the curtain of mist behind which individuals have sought to shield themselves from corporate delinquencies, so there may be seen and reached by the Commission under section eleven in the circumstances here disclosed the corporate instrumentalities in the hands of individuals whom it is enabled to see behind such curtain.

The corporate entity of the Nevada Packing Company fails to furnish any avenue of escape for Respondent from the Clayton Act. In the case of *The United States* v. *United Shoe Machinery Company* (234 Fed. 127, 141, 143) the Court said:

> Whatever may have been the views of the courts in the early days of corporate existence, when there were but few corporations, and they mostly confined to business of a quasi public nature, at this date courts, and

> especially courts of equity, will look behind the corporate fiction, and if it clearly appears that one corporation is merely a creature of another, the latter holding all the stock of the former, thereby controlling it as effectively as it does itself, it will be treated as the practical owner of the corporation, when necessary for the purpose of doing justice. * * * From the allegations in the complaint it is beyond question that the Maine company is merely a subsidiary of the New Jersey company, and that both are under the absolute control, by reason of its stock ownership, of the New Jersey corporation. The acts of one are the acts of all these corporations; in fact, it may truthfully be said that they are the acts of the United Shoe Machinery Corporation. This being the case, they are properly joined as defendants. (*U. S.* v. *United Shoe Machinery Company*, 234 Fed. 127.)
>
> The decision of the district court was affirmed by the Supreme Court of the United States. (*United Shoe Machinery Company* v. *United States*, 258 U. S. 451).

In *United States* v. *Milwaukee Refrigerator Transit Company* (142 Fed. 247, 255), the Court said:

> A corporation, from one point of view, may be considered an entity without regard to its shareholders, yet the fact remains self-evident that it is not in reality a person or thing distinct from its consistent parts. The word "corporation" is but a collective

> name for the members who compose the association (citing authorities). If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule and until sufficient reason to the contrary appears; but when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime the law will regard the corporation as an association of persons.

It was this view of the condition presented here that prompted the Commission to include particularly the plant and property in its order for divestment of the stock of the Nevada Packing Company. It is needless to recite any of the frequent utterances of courts to the effect that maintenance of competitive conditions and freedom of trade from restraints constituted an essential purpose of the Sherman antitrust act. Indeed, the first bill introduced bearing the name of Senator Sherman was addressed particularly against restraint of competition.

It has become axiomatic that in the dissolution of illegal combinations, a paramount purpose has impelled Courts so to provide in the decrees as to prevent any reintegration of the units whose cooperation had produced or contributed to the prohibited results. This has been done, in order to restore so far as practicable competitive conditions which preceded the violation of the antitrust act. In the accomplishment of this result, so funda-

mental to the achievement of any substantial benefit, and so manifestly a vital purpose of the Sherman Law, drastic and comprehensive decrees have been entered by the Courts, and sustained, notwithstanding vigorous and persistent appeal to various provisions of the Constitution for protection. As an instance, in the decree in *United States* v. *Standard Oil Company*, it was ordered that certain defendants, their officers, agents, servants, and employees should refrain from causing, under certain conditions, the conveyance of the physical property and business of any of the said parties, to a potentially competitive party to the combination dissolved. It was urged that this requirement unlawfully restricted distributees, after the dissolution, in the sale or disposal of their properties, that it would injure and destroy the value of the same and render their future profitable use practically impossible. This Court held that the decree in the particular attacked, was acceptable and did not deprive the stockholders of the power to make normal and lawful contracts but simply restrained them from any device which might tend to recreate the illegal combination dissolved. In the decree in *United States* v. *American Tobacco Company* (221 U. S. 106, 188) careful provision was made for disintegration of the units composing the illegal combination sought to be dissolved, and in spite of resistance, ending only in this Court, asserting infringement of constitutional rights, the decree regulating the dissolution was approved.

Reference to the following cases will emphasize the wisdom underlying the decrees by which illegal combinations have been combated:

U. S. v. *Union Pacific Railroad Company*, 226 U. S. 96.

U. S. v. *Corn Products Refining Company et al.*, 234 Fed. 964.

U. S. v. *Cement Securities Company et al.*, 268 U. S. 588.

Enlightened by the methods so employed by courts in the dissolution of illegal combinations, Congress could never have intended to omit from an order to enforce compliance the indispensable reference to physical properties and thereby require the Federal Trade Commission to follow one stage always behind the violator of the Act, leaving it in possession of territory reached and denying only that already traversed.

An order would accomplish precisely this result, which required divestment of stock, in a narrow and diminutive sense, leaving respondent in possession of property or advantage derived from its use. Such an order would be superfluous unless practically simultaneous with the acquisition of the stock, and effectual before it could be utilized in any way to obtain property or advantage. This would necessitate celerity unknown to Courts or administrative bodies, which was neither in contemplation by Congress, as evidenced by other provisions of the Act, nor practicable under our system of government.

It would seem that Congress after prolonged consideration of the Act, in committees and extensive debates, in which conditions of every description in the industries of the country were exhibited and exhaustively discussed would not ignore a means of evasion, which would occur to the most casual mind, and which would be manifestly invoked to thwart its purpose whenever enforcement of its Act should be undertaken.

The spirit and reason of the Act and consideration of its context, supplemented by reference to effects and consequences that must necessarily follow any other construction of Section 11 than that exemplified by the order under consideration, impels us to the conclusion that such order is valid and should be sustained.

Assuredly no order could contribute less to the restoration of competitive conditions destroyed by Respondent than one requiring surrender of stock worth no more than the paper on which it is printed, as declared by Circuit Judge Ross in his dissenting opinion. (R. 614.)

III

Respondent should not be allowed to take advantage of its violation of law

The wisdom of great age is embodied in the maxim which has come down to us that no man can take advantage of his own wrong, and must be recognized and applied here.

In the case of *Little* v. *Fleischman et al.* (98 S. E. 455, 458) the Supreme Court of North Carolina used the following language:

> That no man should be permitted to take advantage of his own wrong is not only a principle of the common law, but a maxim of general jurisprudence which is well recognized and established. It is based on elementary principles and is applied both in courts of law and of equity, the reasonableness and necessity of the rule being manifest. It is of such general application that it admits of illustration from every branch of legal procedure, and is one of the basic principles which govern this case. Broom, Legal Maxims (6 Am. Ed.), p. 212; Star, p. 275, and cases. It applies even though the actual wrong was unconsciously committed, which we have no doubt was the case here.

In *Continental Wall Paper Co.* v. *Voight & Sons Company*, 212 U. S. 227, 262, this Court said:

> Stated shortly, the present case is this: The plaintiff comes into court admitting that it is an illegal combination whose operations restrain and monopolize commerce and trade among the states and asks a judgment that will give effect, as far as it goes, to agreements that constituted that combination, and by means of which the combination proposed to accomplish forbidden ends. We hold that such a judgment can not be granted without departing from the statutory rule, long established in the jurispru-

> dence of both this country and England, that a court will not lend its aid, in any way, to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality, although the result of applying that rule may sometimes be to shield one who has got something for which as between man and man he ought, perhaps, to pay, but for which he is unwilling to pay.

Here respondent, while not admitting, is found by the Commission and by the Court to have acquired certain property in violation of law by a transaction as much condemned by the Clayton Act as the illegal combination in the case last noted was violative of the Sherman Law, but the Court below would actually give effect to the illegal transaction while this Court refused to give effect to an agreement no more illegal.

The same view seems to have been held by the Court in *Thatcher Manufacturing Company* v. *Federal Trade Commission* (5 F. 2nd, 615, 621).

IV

The acts and practices of the Respondent as found by the Commission and confirmed by the Court constitute unfair methods of competition in interstate commerce and of themselves justify the order under consideration

In *Federal Trade Commission* v. *Beech-Nut Packing Company*, 257 U. S. 441, 453, this Court said:

> The Sherman Act is not involved here except in so far as it shows a declaration of

> public policy to be considered in determining what are unfair methods of competition which the Federal Trade Commission is empowered to condemn and suppress. The case now before us was begun under the Federal Trade Commission Act and Clayton Act, both of which were intended to supplement previous antitrust legislation.

The public policy has been proclaimed by Congress as certainly in the Clayton Act as in the Sherman Act. A method of competition therefore which contravenes the policy announced in the Clayton Act, just as surely as if it violated the policy embodied in the Sherman Act, is an unfair method of competition. There is no rational ground for the conclusion that conduct which violates the public policy expressed in the Sherman Act may be an unfair method of competition, but conduct repugnant to the policy declared by the Clayton Act can not be.

> *National Harness Manufacturers Association* v. *Federal Trade Commission*, 268 Fed. 705.
>
> *Wholesale Grocers Association of El Paso*, v. *Federal Trade Commission*, 277 Fed. 657.

The effort of Respondent while operating the plant of the Nevada Packing Company to create the impression that it was an independent competitor brings this case clearly within the characterization by Judge Buffington, of the Circuit Court of Appeals for the Third Circuit, in *United States*, v.

United States Steel Corporation, when (223 Fed. 55–61), among other pertinent references, he said:

> If it was seeking to deceive purchasers by false appearance of competition when in fact it owned or controlled such seeming competition, then it was prejudicing, not only that portion of the public which desired to purchase steel, but the public interest generally by unduly obstructing the course of trade and thereby preventing the steel business from moving in its natural and normal channel.

The acts which this Court last mentioned declared would prejudice the public interest by unduly restricting competition or unduly obstructing the course of trade are precisely the acts which in its course of deception the Respondent perpetrated upon the public. The Respondent was seeking to deceive purchasers by a false appearance of competition when it owned and controlled such seeming competition, and this fact is established by evidence which it has neither repudiated nor explained. (R. pp. 562–569.)

It thus appears that though the Respondent, Western Meat Company, controlled Nevada Packing Company, it was ostensibly conducted as a separate, distinct, and independent competitor.

The offense of the Respondent therefore consisted not only in the acquisition of the capital stock of the Nevada Packing Company, where the probable effect was to substantially lessen compe-

tition between the two companies, but in using such stock so acquired to suppress and finally eliminate competition and restrain trade in the area covered by former activities of the two companies. There is authority under section five to compel Respondent to cease and desist from operating or using the plant and property of the Nevada Packing Company in connection with the Western Meat Company or otherwise than as a competitor. There could be no restoration of competitive conditions, no return to the status quo, without which Respondent must profit from its wrongdoing, without surrender of the property secured by the stock as well as the stock. There can be no relief afforded the public whose rights are infringed so long as Respondent may remain intrenched in its position, securely fortified by the plant and property its defiance of the act has enabled it to seize and which it will retain if the modification of the order is affirmed.

V

The Order to divest the stock of the Nevada Packing Company, including the plant and property of the Company, involves no exercise of legislative power

Reference to a few decisions only of this Court negatives any suspicion of legislation by the Commission in the order here.

In the case of *Interstate Commerce Commission* v. *Goodrich Company* (224 U. S. 194, 214), the Court said:

The Congress may not delegate its purely legislative power to a commission, but having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and investigations of the facts with a view of making orders in a particular matter within the rules laid down by Congress.

Union Bridge Company v. *United States*, 204, U. S. 365.

Louisville & Nashville Railroad Co. v. *Garret*, 231 U. S. 298; *Pennsylvania Railroad Co.* v. *International Coal Co.* 230 U. S. 184.

National Pole Company v. *Chicago and North Western Railroad Company*, 211 Fed. 65.

United States v. *Grimaud*, 220 U. S. 506.

In these cases this Court clearly upholds delegation of authority just as comprehensive and vital in its contact with property and property rights as the authority exercised by the Commission in the Order involved here.

VI

The order involves no exercise of the judicial power of the United States within the meaning of the Constitution

In the case of *Murray et al.* v. *Hoboken Land and Improvement Company*, 18 Howard, 280, 284, the Court dealing with the subject of judicial power used the following language:

> To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.

In the Clayton Act, and especially in section eleven thereof Congress has imposed on the Federal Trade Commission a duty in respect to enforcement of certain sections of the law, which involves the exercise of judicial power in an enlarged sense but it is not judicial power within the meaning of the Constitution. The judicial power would have been capable of acting on them, because they are susceptible of judicial determination. Congress, however, intent upon a plain, prompt, and efficient reinforcement as well as prophylactic treatment of the antitrust laws, enacted the Clayton Law. Instead of bringing the matters entrusted to the Commission within the cognizance of the Courts of the United States, in the first instance, it manifested an evident determination not to do so.

This Court has settled the line of demarkation between functions and duties requiring exercise of judgment even where controverted questions of fact and law arise, and substantial interests are involved, and such as entail the exercise of judicial power within the meaning of the Constitution. It early established the power of Congress to exercise or confer on special tribunals created by it the authority to exercise powers which involve judgment and discretion and are in a sense judicial but not in the sense of the Constitution.

> *Hayburn's Case*, 2 Dal. 409; *U. S.* v. *Ferreira*, 13 How. 40; *Gordon* v. *United States*, 117 U. S. 696.

Order to divest stock would surely be as much an exercise of the forbidden judicial power as an order to divest property, and the inclusion of the latter in the order here in no way tends to transform it into an exercise of judicial power of the United States.

There has been no claim in this case, that the Commission exceeded its authority in ordering divestment of the stock, though such order would be just as much exposed to the charge of exercising judicial power which Congress could not take away from the Courts, as one including the plant and property. It is true, that in some of the cases just submitted, this Court held there was no exercise of judicial power by the inferior court, or tribunal, because there was no independent and final authority conferred on this Court to review and thereafter

enforce its judgments. Their consideration, however, is suggested, to demonstrate that all the powers, or processes, or measures, expressed in judicial decrees, are by no means, ipso facto, judiciai powers. It may here be observed, however, that while the Clayton Act vests in the Circuit Court of Appeals, the power to review the orders of the Commission, jurisdiction is not conferred to set aside an order to divest stock or to cease and desist from violation of the certain sections of the Clayton Act, if the Findings on which the order is based, are themselves supported by testimony. Determination of the weight of evidence is entrusted to the Commission, and the only exercise of judgment with which the Court is invested in this connection is the duty of ascertaining whether there is any evidence, irrespective of its weight, to support the Findings.

CONCLUSION

The judgment of the Circuit Court of Appeals modifying the order of the Federal Trade Commission should be reversed, and the order of the petitioner affirmed.

BAYARD T. HAINER,
Chief Counsel, Federal Trade Commission.
ADRIEN F. BUSICK,
Assistant Chief Counsel.
JAMES M. BRINSON,
Of Counsel.

○

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1926.

No. 96

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

WESTERN MEAT COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RESPONDENT.

JEREMIAH F. SULLIVAN,
SULLIVAN, SULLIVAN AND THEO. J. ROCHE,
Attorneys for Respondent.

EDWARD I. BARRY,
FRANK L. HORTON,
Of Counsel.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

SUBJECT INDEX.

PAGE

THE QUESTION BEFORE THE COURT 1

HISTORY OF THE CASE 2

THE CIRCUMSTANCES UNDER WHICH RESPONDENT PURCHASED THE CAPITAL STOCK OF THE NEVADA PACKING COMPANY 7

SUMMARY OF THE ARGUMENT 9

I. Under the Federal Trade Commission Act and the Clayton Act the Commission is without power or authority in this proceeding to issue any order other than one requiring respondent to "cease and desist" from the violations complained of and to "divest itself of the stock held" 9

(a) Section 5 of the Federal Trade Commission Act empowers the Commission, in a proper case, to order the person, firm or corporation engaged in the unfair method of competition to cease and desist from using the unfair method complained of. "To cease and desist" means to "discontinue" and applies entirely to the future 9

(b) Section 11 of the Clayton Act authorizes the Commission, in a proper case, to require a corporation which acquires and holds the capital stock of a competitor corporation to "cease and desist" from violating the provisions of Section 7 of said Act, and to "divest itself of the stock held." The order prescribed by Congress relates to the intercorporate stockholding and nothing else 9-10

(c) The Commission, an administrative body, has no power or authority other than expressly conferred by the statutes 10

(d) Proceedings by the Commission under the Federal Trade Commission Act and the Clayton Act are preventative, not punitive. The Commission is without authority to inflict a penalty..... 10

II. The legislative purpose of the Clayton Act has been recognized by the Commission, and it has expressly disclaimed power or authority to require the purchasing corporation to do more than to "cease and desist" from violating the provisions of said Act and to "divest itself of the stock held"..... 10

(a) The Commission has recognized that Section 7 of the Clayton Act is directed at the "holding company" and the "bogus independent"; that Section 11 is intended to prevent those judicially declared objectionable trade practices.. 10

(b) The Commission asked Congress to "strengthen" the Clayton Act so as to make unlawful the acquisition by one corporation of the "property" of a competitor corporation 10

(c) Such additional power was not granted by Congress 10

III. The order in the Aluminum case, pointed to by the Commission as a precedent for its order in the instant case, did not require a divestment of anything other than the stock held 10-11

IV. There is no analogy between the powers of Circuit Courts under the Sherman Act and the powers of the Federal Trade Commission under the Clayton Act 11

(a) In proceedings under the Sherman Act no form of order is prescribed. The court, sitting in equity, is empowered to exercise *judicial* discretion. Congress has prescribed the form of order to be used by the Commission in proceedings under the Clayton Act 11

(b) The Commission is an administrative and not a judicial body. It is here attempting to function as a court 11

V. If Sections 7 and 11 of the Clayton Act are construed and applied according to their plain meaning, no constitutional question arises 11

(a) The authority of Congress to enact the Federal Trade Commission Act and Clayton Act is derived from the "commerce clause" of the Constitution 11

(b) Authority of Congress under the "commerce clause" 11-12

(c) In the Standard Oil case this court enumerated certain objectionable trade practices heretofore employed to restrain trade and attain monopoly; among these where the "holding company" and the "bogus independent" .. 12

(d) In the Clayton Act Congress legislated against these practices, and Sections 7 and 11 of the Clayton Act were specifically directed against the "holding company" and the "bogus independent" ... 12

(c) Construed as an inhibition against the "holding company" and the "bogus independent" Sections 7 and 11 are constitutional, but construed as the Commission would have them construed they are unconstitutional because rights are prohibited to corporations solely because they are corporations..... 12

ARGUMENT IN FULL..... 13

I. Consideration of the pertinent provisions of the Federal Trade Commission Act and the Clayton Act will disclose that the Commission was without power or authority in this proceeding to issue any order other than one requiring respondent to "cease and desist" from the violations complained of and to "divest itself of stock held"..... 13

II. The legislative purpose behind the Clayton Act has heretofore been recognized by the Commission and its members, and they have expressly disclaimed power or authority to require the purchasing corporation to do anything other than to "cease and desist" from further violating the provisions of said Act and to "divest itself of the stock held".. 19

III. The order in the Aluminum case, pointed to by the Commission, as a precedent for its order in the instant case, did not require a divestment of anything other than the stock held 27

IV. There is no analogy between the powers of Circuit Courts under the Sherman Act and the powers of the Federal Trade Commission under the Clayton Act..... 28

V. If Sections 7 and 11 of the Clayton Act are construed and applied according to their plain meaning, no constitutional question arises 29

TABLE OF CASES, TEXT BOOKS AND STATUTES CITED.

Aluminum Company of America v. Federal Trade Commission, 261 U. S. 616..... 22
Aluminum Company of America v. Federal Trade Commission, 284 Fed. 401..... 27

Chamber of Commerce v. Federal Trade Commission, 13 F. (2nd) 673, 685..... 25
Chamber of Commerce v. Federal Trade Commission, 280 Fed. 45..... 29
Commodities Claim Cases, 213 U. S. 366..... 32
Congressional Record, August 27, 1914, pp. 14315, 6. 19

Dayton-Goose Creek Railway Company v. U. S. 263 U. S. 456 30

Eastman Kodak Co. v. Federal Trade Commission, 7 F. (2nd) 994..... 29

Federal Trade Commission Bulletin No. 1 of January 31, 1916, Conference Ruling No. 8..... 20
Federal Trade Commission v. Gratz, 253 U. S. 421.. 24
Federal Trade Commission v. Beechnut Packing Co. 257 U. S. 441, 453.....14, 17
Federal Trade Commission v. Sinclair Refining Co. 261 U. S. 463, 475..... 18

Kentucky Finance Corp. v. Paramount Auto Exchange, 262 U. S. 544..... 32

Mallinckrodt Chemical Works v. Missouri, 238 U. S. 41 31

National Harness, etc. Association v. Federal Trade Commission, 268 Fed. 705 29

Report of Committee of House of Representatives, 66th Congress Serial 5, p. 21 21

Senator Cummings in Congressional Record, August 27, 1914, pp. 14, 315, 6 19

Society of Sisters of the Holy Name v. Pierce, 296 Fed. 928, affirmed in 268 U. S. 510 32

Southern Bell Telephone and Telegraph Co. v. Town of Calhoun, 287 Fed. 381 32

Statutes:

Federal Trade Commission Act (approved September 26, 1914, C. 311, 38 Stat. 717, Comp. Stat. Sec. 8836a) 13

Clayton Act (approved October 15, 1914, 38 Stat. 730 to 733 inclusive, Comp. Stat. Sec. 8835) 13, 15, 16, 17, 29, 30

Sherman Act (26 Stat. 209, Comp. Stat. Sec. 8820, 1, 2, 3 ..... 28, 29

U. S. v. Standard Oil Company, 221 U. S. 1, 41, 43 ... 30

West Meat Co. v. Federal Trade Commission, 1 F. (2nd) 95 4

West Meat Co. v. Federal Trade Commission on Rehearing, 4 F. (2nd) 223 5

Wilder Manufacturing Co. v. Corn Products Refining Co. 236 U. S. 165 18

REFERENCE TO THE OFFICIAL REPORT OF THE OPINIONS DELIVERED IN THE COURT BELOW.

Western Meat Company v. Federal Trade Commission, 1 F. (2nd) 95 4

Western Meat Company v. Federal Trade Commission, on rehearing 4 F. (2nd) 223 5

IN THE

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FEDERAL TRADE COMMISSION,
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vs.

WESTERN MEAT COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RESPONDENT.

THE QUESTION BEFORE THE COURT.

Although the granting of the Commission's petition for certiorari has the effect of bringing here for review the entire proceedings before the Circuit Court of Appeals for the Ninth Circuit, respondent feels that in view of the fact that it filed no application in this Court and, therefore, impliedly indicated its willingness to comply with the order of the Commission as modified by said Circuit Court of Appeals, that argument should be now limited to the question:

> Has the Federal Trade Commission, in a proceeding instituted under Section 5 of the Federal Trade Commission Act and under Sections 7 and 11 of the Clayton Act, the power and authority to

> issue an order requiring a corporation which holds the capital stock of another corporation to divest itself not only of the stock held, but also of the plant and properties of said other corporation?

or, applying the question to the situation presented here:

> Did the Federal Trade Commission have the power and authority, under either of said Acts, to issue an order which, in effect, would prevent respondent from divesting itself of the stock of the Nevada Packing Company by dissolving said company and taking over its property and assets in the course of such dissolution?

The original order of the Commission would prevent respondent from thus dissolving the Nevada Packing Company, taking over its property and assets, and thereafter operating the Nevada plant as a branch of respondent and in the name of respondent. The order of the Commission as modified by the judgment of the Circuit Court of Appeals for the Ninth Circuit will permit respondent to divest itself of the stock in that manner.

Respondent will endeavor, in the course of this brief, to show that the order of the Commission, as thus modified by the Circuit Court of Appeals and requiring only a divestment of the stock held, is the only order that the Federal Trade Commission has any power or authority to make under the provisions of either the Federal Trade Commission Act of the Clayton Act. Before entering upon a discussion of that question, respondent will briefly refer to the history of the case since the inception of the proceedings by the Federal Trade Commission:

History of the Case.

On or about December 30, 1916, respondent, Western Meat Company, a corporation, acquired all of the capital stock of Nevada Packing Company.

On or about November 24, 1919, and after respondent had held said stock of the Nevada Packing Company for nearly three years, the Federal Trade Commission, claiming that as a result of the acquisition of said stock respondent had entirely eliminated the competition which had theretofore existed between it and said Nevada Packing Company and had restrained commerce in the purchase and sale of meat and meat products in the States of Nevada and California, filed its complaint charging a violation of the provisions of Section 5 of the Federal Trade Commission Act and of Section 7 of the Clayton Act and contemporaneously therewith called upon respondent *to show cause why an order should not be entered by the Federal Trade Commission requiring respondent "to cease and desist" from the violations complained of and "to divest itself of the stock or shares capital"* unlawfully held in said Nevada Packing Company. (R. 8.)

The allegations of the complaint were put in issue by the answer filed by respondent. (R. 13.) The cause proceeded to a hearing without the Commission indicating that it had any intention or desire to affect the plant and properties of Nevada Packing Company or to enter any order other than the one expressly authorized in a proper case by the provisions of the Federal Trade Commission Act and the Clayton Act, viz.: an order requiring respondent to cease and desist from the violations complained of and to divest itself of the stock held.

After an extended hearing, the Commission, on or about February 2, 1923, entered an order (R. 599) not only requiring respondent *"to cease and desist"* from violating the provisions of Section 5 of the Federal Trade Commission Act and of Section 7 of the Clayton Act,

and *to divest itself of the stock held*, but, in addition thereto, requiring respondent

> * * * to include in such divestment *the Nevada Packing Company's plant and all property necessary to the conduct and operation thereof* as a complete, going packing plant and organization, and so as to neither directly nor indirectly retain any of the fruits of the acquisition of the capital stock of said Nevada Packing Company, a corporation,"

and even still further requiring

> "* * * that in such divestment no stock or property above mentioned to be divested shall be sold or transferred, directly or indirectly, to any stockholder, officer, director, employee or agent of, or any one otherwise directly or indirectly connected with or under the control or influence of respondent or any of its officers, directors or stockholders, or of officers, directors or stockholders of any of respondent's subsidiary or affiliated companies." (R. 601.)

On or about July 27, 1923, respondent filed a petition for review (R. 1) in the Circuit Court of Appeals for the Ninth Circuit, claiming, in said petition, that the evidence did not warrant the Commission in holding that respondent had violated either Section 5 of the Federal Trade Commission Act or Section 7 of the Clayton Act, and furthermore, that even though the Commission's findings to that effect were justified by the evidence, it had no power or authority to enter any order other than one requiring respondent "*to cease and desist*" from violating said provisions of the Federal Trade Commission and Clayton Acts, and "*to divest itself of the stock held*" by it in the Nevada Packing Company. The petition for review was denied (1 F. (2nd) 95), the court in its opinion not even discussing the question as to whether the Commission's order was broader and more comprehensive than that authorized by Congress. (R. 604.)

Thereupon, respondent filed a petition for rehearing,

in which respondent, without waving any of the grounds originally urged by it for the setting aside of the Commission's order, particularly emphasized that even though the Commission was justified in finding against respondent's contentions upon the facts, nevertheless respondent's objections to the form and scope of the order for divestment were well taken. The court granted a rehearing solely for the purpose of hearing further argument upon that question.

After reargument devoted entirely to a consideration of the scope and extent of the congressional grant of power to the Federad Trade Commission, the Court entered judgment (4 F. (2nd) 223) modifying the order of the Federal Trade Commission *so as to eliminate therefrom the injunction against the acquisition by respondent of the plant and property of the Nevada Packing Company.*

In the briefs upon reargument, and likewise orally before the Court, respondent contended, among other things, that its right or the right of its stockholders, officers, etc., to purchase the physical assets and properties of the Nevada Packing Company had never been involved in the proceeding, and that the Commission was entirely without jurisdiction to predetermine that question upon the record before it; that, nevertheless, the Commission had made an order which, if enforced, would prevent respondent from taking over said physical assets and properties; that said order, unless modified, would prevent respondent from dissolving the Nevada Packing Company as a corporation and from acquiring the assets of the latter company as a result of such dissolution; and still further that the Commission's order, if it remained unchanged, would prevent respondent from selling or transferring said stock or property to one who

holds only one share of its capital stock, even though said holder of said stock had no other connection with respondent.

As a result of respondent thus indicating some of the particulars in which the Commission had exceeded its jurisdiction, the reargument rather naturally resolved itself into a discussion of the question: Did the Commission have the power or authority to make an order which, in effect, would enjoin the Western Meat Company from acquiring the plant and property of the Nevada Packing Company—and which would prevent the Western Meat Company, as the holder of all of the stock of the Nevada Packing Company, from causing the dissolution of the latter corporation and from acquiring its plant and property in the course of such dissolution? With this explanation, it can be readily appreciated why the judgment of the Circuit Court of Appeals for the Ninth Circuit was specifically to the effect that the injunction against the acquisition by respondent of the plant and property of the Nevada Packing Company should be eliminated from the order entered by the Commission. (R. 612.)

In its opinion modifying the order of the Federal Trade Commission (R. 613), the Circuit Court of Appeals held that the Clayton Act

> "* * * *gives the Federal Trade Commission no authority other than the authority to command the offending corporation to desist from holding stock in another corporation in violation of Section 7*"....

and that there is no authority

> "* * * *given by the Federal Trade Commission Act to require the petitioner here to do more than to divest itself of its stock in the Nevada Packing Company.*"

The judgment of the Circuit Court of Appeals modifying the order of the Federal Trade Commission must be

read and considered in the light of its written opinion—and when so read and considered it is not susceptible of the construction which petitioner would place upon it, to wit, that the Circuit Court of Appeals concluded that the order, in so far as it required a divestment of the physical properties of Nevada Packing Company, should not be disturbed. On the contrary, the Court unequivocally found that the Commission exceeded its authority in requiring respondent to divest itself of the plant and properties of Nevada Packing Company when it said:

> "*We think the order in the instant case goes beyond the authority conferred on the Federal Trade Commission in requiring the petitioner to divest itself of the Nevada Packing Company's plant and the property necessary to the conduct and operation thereof* * * *." (R. 613.)

The Circumstances Under Which Respondent Purchased the Capital Stock of the Nevada Packing Company.

Prior to December 30, 1916, the Nevada Packing Company, a corporation, operated a small meat packing plant at Reno, Nevada, and in connection therewith purchased live stock and sold meat and meat products. It operated on a comparatively small capital, approximately $353,000.00, and confined its operations almost entirely within the State of Nevada. About twenty-five per cent of the total volume of its entire business consisted in the sale of smoked meats for Armour and Company on a commission basis.

The entire capital stock of the Nevada Packing Company was owned by one U. M. Slater and two other residents of Nevada, who entrusted the management and control of the business to him. He had been advised by his physician that he must get out of business because of

failing health. For years Mr. Slater and the other stockholders of the Nevada Packing Company endeavored to find a purchaser for their stock. As early as 1913 (about three years before the sale to respondent was made), Mr. Slater approached Mr. Washburn, of the Western Meat Company, upon the subject but without result. Thereafter he proposed a sale to others engaged in the same general business, including Armour and Company, which concern had a representative at the Nevada plant for months taking an inventory and making a general survey of the business. Finally, Armour and Company declined to buy, and the matter was again taken up with respondent. Mr. Slater was willing to sell and actually did sell to respondent the stock of the Nevada Packing Company owned and controlled by him and his associates at a price arrived at by an appraisal of the physical assets of the company.

The Nevada Packing Company was really a one-man concern, an instrumentality through which Mr. Slater transacted the meat packing business. It must be evident that any one desiring or intending to eliminate the Nevada Packing Company from the field of competition, would, of course, have endeavored to restrain the future activities of Mr. Slater, too, yet it appears that when the stock owned and controlled by him was purchased by respondent it exacted no promise from him not to engage in the same business in the State of Nevada or any other place—and very shortly after the sale was consummated, Mr. Slater purchased an interest in the Grayson-Owens Packing Company, of Oakland, California, and thereafter solicited business in the Nevada territory. (R. 58.) It appears that Mr. Slater also conducted a wholesale meat business in Oakland, California, under the name of U. M. Slater, Inc.—and that Mr.

Slater was interested in this business prior to the time he sold the Nevada Packing Company to respondent, and that he retained his interest therein until his death in 1919. (R. 132, 133.)

The record discloses that there was no secret about the acquisition by respondent of the capital stock of the Nevada Packing Company. Immediately upon the consummation of the original transaction, the particulars thereof became known to the general public and to the competitors and customers of both respondent and the Nevada Packing Company. The press reports of the transaction gave it wide publicity. (See photostat copies of newspaper accounts, R. 588 to 590.)

Immediately after respondent acquired the stock of the Nevada Packing Company, the later's plant was enlarged and rebuilt at an expense of $200,000.00 to $250,000.00. (R. 139.)

Summary of the Argument.

(I) A brief consideration of the pertinent provisions of the Federal Trade Commission Act and the Clayton Act will disclose that the Commission was without power or authority in this proceeding to issue any order other than one requiring respondent to cease and desist from the violations complained of, and to divest itself of the stock held.

(a) Section 5 of the Federal Trade Commission Act empowers the Commission, in a proper case, to order the person, firm or corporation engaged in the unfair method of competition to cease and desist from using the unfair method complained of. "To cease and desist" means to "discontinue" and applies entirely to the future.

(b) Section 11 of the Clayton Act authorizes the Commission, in a proper case, to require a corporation which acquires and holds the capital stock of a

competitor corporation to "cease and desist" from violating the provisions of Section 7 of said Act, and to "divest itself of the stock held." The order prescribed by Congress relates to the intercorporate stockholding and nothing else.

(c) The Commission, an administrative body, has no power or authority other than that expressly conferred by the statutes.

(d) Proceedings under the Federal Trade Commission Act and the Clayton Act are preventative, not punitive. The Commisison is without authority to inflict a penalty upon respondent for having acquired the stock of the Nevada Packing Company.

(II) The legislative purpose behind the Clayton Act has heretofore been recognized by the Commission and its members, and they have expressly disclaimed power or authority to require the purchasing corporation to do anything other than to cease and desist from further violating the provisions of said Act and to divest itself of the stock held.

(a) The Commission and its members have in various ways (particularly referred to) recognized that Section 7 of the Clayton Act was and is directed at the "holding company" and the "bogus competitor." They have recognized that the order prescribed by Congress in Section 11 of the Clayton Act was and is intended to prevent these judicially declared objectionable trade practices.

(b) The members of the Commission, realizing that they are without power to issue an order affecting property other than stock, appealed to Congress that the Clayton Act should be strengthened so as to make unlawful the acquisition by one corporation of the "property" of a competitor corporation.

(c) This additional power was not granted by Congress and yet the Commission is endeavoring to exercise it by attempting to impose upon respondent an order which affects property other than stock.

(III) The order in the Aluminum case, pointed to by the Commission as a precedent for its order in the in-

stant case, did not require a divestment of anything other than the stock held.

In that case the order to divest only required a divestment of stock. The form and scope of the order was not in issue before the Circuit Court of Appeals or before this Court, where certiorari was applied for and denied.

(IV) There is no analogy between the powers of Circuit Courts under the Sherman Act and the powers of the Federal Trade Commission under the Clayton Act.

(a) Proceedings based upon a violation of the Sherman Act are directly instituted in the Circuit Courts, and the proceedings are termed by the Act itself "Proceedings in Equity to Prevent and Restrain such violation." The order which the court is authorized to make is not prescribed by Congress, and the court, sitting in equity, is empowered to exercise its judicial discretion and enter a decree in keeping with the case presented.

In the Federal Trade Commission Act and the Clayton Act, Congress not only directed its legislation against certain trade practices, but handed to the Commission a definite, self-sufficient order, designed to accomplish the purposes intended. For a violation of Section 7 of the Clayton Act, Congress directed a divestment of stock only.

(b) The Commission is an administrative and not a judicial body. Despite its protestations to the contrary, the Commission, by seeking to impose upon respondent an order requiring it to divest itself not only of the stock, but also of the plant and properties of the Nevada Packing Company, is attempting to function as a court.

(V) If Sections 7 and 11 of the Clayton Act are construed and applied according to their plain meaning, no constitutional question arises.

(a) The authority of Congress to enact the Federal Trade Commission Act and the Clayton Act is derivable from the Constitutional provision empowering it to regulate commerce.

(b) This constitutional provision authorizes

Congress to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to protect its growth and insure its safety.

(c) In the Standard Oil case, this court enumerated certain objectionable trade practices which had been variously employed to restrain trade and attain monopoly; among these were the "holding company" and "the bogus independent."

(d) In the Clayton Act, Congress legislated against practically all of the trade practices condemned by this court in the Standard Oil case. Section 7 and that part of Section 11 applicable thereto are specifically directed against the "holding company" and the "bogus independent."

(e) Construed as an inhibition against the "holding company" and the "bogus independent," Sections 7 and 11 of the Clayton Act are, in our opinion, constitutional, because they aim at correcting trade practices judicially condemned by this court. Construed as the Commission would have them construed, as prohibiting a corporation, *solely because it is a corporation*, from taking over the plant and property of a competitor corporation, through the medium of a stock transaction, leaving an individual or a copartnership free to acquire said plant and property through that medium without violating any law, said Sections 7 and 11, in our opinion, would be unconstitutional.

ARGUMENT.

I.

A BRIEF CONSIDERATION OF THE PERTINENT PROVISIONS OF THE FEDERAL TRADE COMMISSION ACT AND THE CLAYTON ACT WILL DISCLOSE THAT THE COMMISSION WAS WITHOUT POWER OR AUTHORITY IN THIS PROCEEDING TO ISSUE ANY ORDER OTHER THAN ONE REQUIRING RESPONDENT TO CEASE AND DESIST FROM THE VIOLATIONS COMPLAINED OF AND TO DIVEST ITSELF OF THE STOCK HELD.

The Commission bases its complaint upon the alleged violation of Section 5 of the Federal Trade Commission Act (approved September 26, 1914; C. 311, 38 Stat. 717) and Section 7 of the Clayton Act (approved October 15, 1914; 38 Stat. 730 to 733, inclusive).

Federal Trade Commission Act.

In Section 5 of the Federal Trade Commission Act, Congress empowers and directs the Commission "to *prevent* persons, partnerships or corporations from using unfair methods of competition."

Said Section 5, after thus generally empowering the Commission, provides that the Commission, whenever it shall have reason to believe that any person, partnership or corporation has been or is using any unfair method of competition, shall issue and serve its complaint, *stating* its charges and containing notice of the time and place fixed for a hearing thereon. Then said section provides:

> "The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order

> should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint."

And, with reference to the powers of the Commission in so far as the making of an order in a proper case is concerned, said Section 5 provides that the Commission

> "* * * shall issue and cause to be served on such person, partnership, or corporation, an order requiring such person, partnership, or corporation to *cease and desist* from *using* such method of competition." (Italics ours.)

Assuming for all present purposes that respondent did violate the provisions of Section 7 of the Clayton Act and that *ipso facto* respondent did thereby violate Section 5 of the Federal Trade Commission Act, the Commission was only authorized by Congress to enter an order requiring respondent to "cease and desist" from using the unfair method of competition resulting therefrom.

In *Federal Trade Commission* v. *Beechnut Packing Co.*, 257 U. S. 441, the Supreme Court, referring to the Federal Trade Commission Act, said (at p. 453):

> "That Act declares unlawful 'unfair methods of competition', and gives the Commission authority, after hearing, *to make orders to compel the discontinuance of such methods.*" (Italics ours.)

Manifestly, the Commission, under Section 5 of the Federal Trade Commission Act, may be a properly framed order "*to cease and desist*" compel a discontinuance of the unfair method of competition complained of.

In the instant case, as we have stated, the method of competition complained of (if that charged in the complaint is sufficiently stated) is that resulting from the

acquisition by respondent of the capital stock of the Nevada Packing Company. *Had respondent purchased the physical properties of the Nevada Packing Company instead of its capital stock, and operated the Reno plant as a branch house, it would not have violated Section 7 of the Clayton Act—and respondent could not have been then charged with indulging in an unfair method of competition* in thus acquiring and using such physical properties, for that procedure has not been condemned by the public policy declared in either the Federal Trade Commission Act or the Clayton Act.

It follows, therefore, that if respondent were to divest itself of its stock holdings in the Nevada Packing Company, in compliance with an order properly made under the Clayton Act, it would *ipso facto* comply with any lawful order made by the Commission under Section 5 of the Federal Trade Commission Act.

The Clayton Act.

The prohibitions of the Clayton Act, as the following references thereto will show, are directed against specific practices referred to therein.

Section 2 of said Act declares it unlawful for any person engaged in commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities under certain conditions where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly.

Section 3 thereof makes it unlawful for any person engaged in commerce to lease or sell merchandise or fix a price charged therefor on condition that the lessee or purchaser shall not use or deal in the merchandise of any competitior of the vendor, or lessor, where the

effect may be to substantially lessen competition or tend to create a monopoly.

The text of that part of Section 7 with which we are particularly concerned in this proceeding reads as follows:

> "That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

And Section 8 provides that no person shall be an officer or employee of more than one of certain banks, banking associations, or trust companies, or a director or employee of two or more of certain other competing corporations, under certain circumstances and conditions specifically mentioned in said section.

Section 11 of the Clayton Act authorizes the Federal Trade Commission to "enforce compliance with Sections 2, 3, 7 and 8" thereof. Said Section 11 specifically provides that the authority therein conferred upon the Commission is "*to be exercised as follows*":

> "* * * whenever the Commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of said Sections 2, 3, 7 and 8."

the Commission shall issue and serve its complaint, stating its charges and containing a notice of the time and place fixed for the hearing. Said Section 11 further provides:

> "The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the

> Commission or board requiring such person to *cease and desist* from the violation of the law so charged in the complaint." (Italics ours.)

And then follows the provision that if, upon such hearing, the Commission shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall state its findings,

> "* * * *and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violation, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of Section 7 and 8 of this Act, if any there be, in the manner and within the time fixed by said order.*" (Italics ours.)

This defines *all* of the authority to be exercised by the Commission in any proceeding based upon a violation of the Clayton Act. Its order to the purchasing corporation must be to "*cease and desist*" from violating the provisions of that section, the Commission tending to the mere detail, of course, of reciting the violation complained of.

"*To cease and desist*," as used in Section 11 of the Clayton Act, has exactly the same meaning as "to cease and desist" where employed in Section 5 of the Federal Trade Commission Act—and that meaning is "to discontinue" just as Mr. Justice Day expressed it in *Federal Trade Commission* v. *Beechnut Packing Company*, 257 U. S. 441-453. The Commission, therefore, in a proper proceeding based upon a violation of Section 7 of the Clayton Act has the power and authority to order the purchasing corporation "to discontinue violating said Section 7 by holding stock in its competitor corporation," and of course the Commission has the additional power, as the Act provides, to order that the corporation complained against "*divest itself of the stock held*," but

it has no authority beyond that, for Congress in the opening paragraph of Section 11 of the Clayton Act provided that the powers of the Commission should be exercised in that manner.

Manifestly, the Commission had no power or authority under the terms of either the Federal Trade Commission Act or the Clayton Act to make any order other than one requiring respondent to cease and desist from violating the provisions of said Acts and to divest itself of the stock held.

That the sections of the Federal Trade Commission and Clayton Acts to which we have referred give to the Commission all the authority which it has in proceedings thereunder, we refer to:

> *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463, 475,

wherein this court said:

> "The powers of the Commission are limited by the statutes."

and to

> *Wilder Manufacturing Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 174,

in which Mr. Chief Justice White, speaking for this court, said:

> "Where a statute creates a new offense and denounces the penalty, or gives a new right, and declares the remedy, the punishment or the remedy can be only that which the statute prescribes" (citing numerous cases).

II.

THE LEGISLATIVE PURPOSE BEHIND THE CLAYTON ACT HAS HERETOFORE BEEN RECOGNIZED BY THE COMMISSION AND ITS MEMBERS, AND THEY HAVE EXPRESSLY DISCLAIMED POWER OR AUTHORITY TO REQUIRE THE PURCHASING CORPORATION TO DO ANYTHING OTHER THAN TO CEASE AND DESIST FROM FURTHER VIOLATING THE PROVISIONS OF SAID ACT AND TO DIVEST ITSELF OF THE STOCK HELD.

The congressional debates preceding the adoption of the Clayton Act are persuasive that Section 7 of said Act is intended to meet a situation wherein two or more ostensible competitors are joined together by intercorporate holdings and yet are pretending to function with normal competitive activity. That Congress was directing its efforts toward the elimination of the so-called "bogus independent" and "the holding company" from the field of commerce is quite evident from the remarks of Senator Cummings, who took a most active part in the preliminary discussions. Referring to the preventative purpose behind what is now Section 7 of the Clayton Act, the Senator aptly said:

> "It is just that case that we want, as I think, to prohibit, so that if a consolidation can lawfully occur under the anti-trust laws, it shall be an open, public consolidation, so that everybody can know what is transpiring. * * * I do not believe that is the proper construction of the anti-trust law; otherwise there could be no sale of business. I think there can be, *but wherever the law permits the sale of the business then it ought to be open and public, and a corporation ought not to acquire control of a business simply through the purchase of the stock of a company which continues under its own name, and, so far as the public knows, is independent in its management. That is what I think this section is intended in the main to prevent.*" (Italics ours.) (Congressional Record, August 27, 1914, pp. 14315, 6.)

The Federal Trade Commission has heretofore acted under no delusion concerning the purpose of Section 7 of the Clayton Act and its authority thereunder. It has disclaimed power to make any order other than one requiring the purchasing corporation to divest itself of the stock held.

In its Bulletin No. 1 of January 31, 1916, the Commission gives as Conference Ruling No. 8 the following:

> "*The right of one manufacturer engaged in interstate commerce to buy out a competitor, and jurisdiction of the commission in such matters.*—On inquiry as to the right of one manufacturer to buy out a competitor in the same line of business: *Held, That the only jurisdiction of the commission in respect of such transaction is to enforce the provision of Section 7 of the Clayton Act prohibiting the acquisition by any corporation engaged, in interstate commerce of the capital stock, in whole or in part, of another corporation thus engaged, where the tendency of such acquisition may be to substantially lessen competition between such two corporations, or to restrain interstate commerce or to create a monopoly;* and also possibly to enforce Section 5 of the Federal Trade Commission Act, if such purchase either of property or of capital stock in connection with other circumstances might constitute an unfair method of competition. *Held, also,* That the mere purchase of the property of such competitor other than capital stock is not prohibited by the Clayton Act or the Federal Trade Commission Act." (Italics ours.) (Findings, Orders and Conference Rulings of the Federal Trade Commission, Vol. I, p. 541.)

The same view was expressed by Commissioner Van Fleet of the Federal Trade Commission in connection with the proposed merger of the Midvale Steel & Ordinance Co., the Republic Iron & Steel Co., and the Inland Steel Co. Upon this subject the Commissioner there said:

> "It will be seen that this act is much more far

reaching than the Sherman Act in cases coming within its provisions for the reason that it prohibits substantial lessening of competition between the corporations themselves, and if its language were broad enough to include every combination however effected, it would prohibit all combinations of competing businesses.

In such case and under such construction the Sherman Act would become obsolete. There would be no need ever to resort to it because always the combination, though it did not contravene its provisions, would come within the provisions of the Clayton Act. *So the Clayton Act specifically limits its operation to a case where the combination is effected by the acquisition of shares or share capital,* thus under the well-known maxim of statutory construction '*expressio unius,*' etc., excluding its application to any other state of facts. * * * * * * *There was a well-defined purpose in the Clayton Act, namely, to prevent secret combinations by the acquisition of stock* and a reference to the debate over the bill clearly demonstrated this and clearly shows it did not have in mind the prohibition of the merging of competing companies under all circumstances." (Italics ours.)

Whether well defined or not, such undoubtedly was the purpose of the Clayton Act. Fully appreciating that Congressional purpose and the sufficiency of the order prescribed in Section 11 to give it effect, the Federal Trade Commission asked Congress to amend the Clayton Act so as to give the Commission jurisdiction over physical assets. Members of the Federal Trade Commission appeared before the Committee on the Judiciary of the House of Representatives (66th Congress) on September 8 and 9, 1919. On page 21 of Serial 5 of the hearings, Mr. Victor Murdock, a member of the Commission, expressed himself as follows:

"Now, in section 7, Clayton Act, Mr. Chairman, Congress provided against a corporation's acquisition of stock in competing companies. I think at the time Congress passed that act it was a wise

> piece of legislation. But section 7 of the Clayton Act certainly needs strengthening now, because section 7 does not include the word 'property.' * * * But the Government cannot win where there is an acquisition of property instead of an acquisition of stock as the law stands to-day."

Congress has never given to the Commission the power Mr. Murdock asked for. Notwithstanding steadfast Congressional refusal to grant such power, we find the Commission, first before the Circuit Court of Appeals for the Ninth Circuit, and now before this court, strenuously contending that it has it.

When the Commission incorporated in its order in the instant case, the paragraph requiring respondent to so divest itself of the stock of the Nevada Packing Company,

> "* * * as to include in such divestment the Nevada Packing Company's plant and all property necessary to the conduct an operation thereof as a complete, going packing plant and organization," etc.,

the Commission adroitly attempted to supply "the strengthening" of Section 7 which the Commission had sought to obtain from Congress and which Congress had refused.

The Commission itself in the case of

> *Aluminum Company of America* v. *Federal Trade Commission,* 261 U. S. 616,

disclaimed authority to make any order under Section 11 of the Clayton Act other than one requiring the corporation which has acquired the stock to divest itself of the stock. In its brief, filed in this court on February 19, 1923, and signed by James B. Beck, Solicitor General, W. H. Fuller, Chief Counsel, and Edward L. Smith, attorney, it is said:

> "There is nothing in the Clayton Act which permits the Commission, when it finds a violation of

> Section 7 of the Clayton Act, to make any order other than one requiring the corporation which has illegally acquired stock to divest itself of such stock; and it would seem that a Circuit Court of Appeals has no right under the power of modification given to it by the act, to enter any order excepting one which requires a divestiture of the stock illegally acquired."

It cannot be disputed that respondent had the right to purchase the property and assets of the Nevada Packing Company in December, 1916, the very time that it acquired the capital stock of said company. Had respondent then acquired the physical assets it would, of course, have eliminated all competition existing between it and the Nevada Packing Company, but the only effect on competition would have been merely such restraints and effects as are necessarily incident to the union of two competing businesses—the particular industry still remaining freely competitive and the line of commerce suffering no restraint as the effect of such union—and in so doing, respondent would have violated no law.

The Commission's order, before the same was modified by the Circuit Court of Appeals for the Ninth Circuit, would prevent respondent from taking over the assets of the Nevada Packing Company at this time. It would prevent respondent from disolving the Nevada Packing Company as a corporation and from acquiring the assets of the latter company as a result of such dissolution. If the Nevada Packing Company were so dissolved, respondent would thereby divest itself of the stock held by it in said company. It would thereby end all semblance of a secret combination between it and the Nevada Packing Company, if there was any such semblance—and it would thereby make impossible any deception of the public by a false appearance of competition, because there would, in fact, be no competition at

all. What had been the Nevada Packing Company's plant and property would then be openly operated and publicly known as respondent's plant and property. In a word, the same situation would exist as that which would have existed had respondent acquired the physical assets of the Nevada Packing Company in the year 1916.

The Commission, by its order in this case, has really attempted to visit a penalty upon respondent for having acquired the capital stock, instead of the physical properties, of the Nevada Packing Company. That the Commission is without power or authority to impose any penalty whatsoever must be conceded, for proceedings under the Federal Trade Commission Act and the Clayton Act are not punitive in character. Mr. Justice Brandeis, in his dissenting opinion in

> *Federal Trade Commission* v. *Gratz*, 253 U. S. 421,

(wherein the majority opinion annulled an order of the Federal Trade Commission) expressed his views concerning the legislative purpose behind the Federal Trade Commission Act. We here quote the pertinent part of his opinion: (p. 432.)

> "The proceeding is not punitive. The complaint is not made with a view to subjecting the respondents to any form of punishment. It is not remedial. The complaint is not filed with a view to affording compensation for any injury alleged to have resulted from the matter charged, but with a view to protecting individuals from any such injury in the future. The proceeding is strictly a preventive measure taken in the interest of the general public * * * (434).
>
> "In undertaking to regulate competition through the Trade Commission, Congress (besides resorting to administrative as distinguished from judicial machinery) departed in two important respects from the methods and measures theretofore applied in dealing with trusts and restraints of trade.

"(1) Instead of attempting to inflict punishment for having done prohibited acts, *instead* of enjoining the continuance of prohibited combinations and *compelling disintegration of those formed in violation of law*, the act undertook to preserve competition through supervisory action of the Commission. The potency of accomplished facts had already been demonstrated. The task of the Commission was to protect competitive business from *further* inroads by monopoly. * * * Its action was to be prophylactic. Its purpose in respect to restraints of trade was prevention of diseased business conditions, not cure." (Italics ours.)

Exactly the same legislative purpose was and is behind the Clayton Act. That the Federal Trade Commission entirely ignored that purpose in the making of the order which it is attempting to justify before this court is too apparent for argument.

The effect of orders of the Federal Trade Commission under the Clayton Act is entirely in the future. The Commission has not been given *carte blanche* authority to restore the status *quo ante* or to revive the competitive conditions which, in its opinion, existed before the acquisition of the stock. Had Congress intended to confer any such power upon the Commission, it would have expressly done so.

As further authority for our contention that an order of the Federal Trade Commission, based upon a violation of Section 7 of the Clayton Act, must have its effect entirely in the future—and must be directed toward preventing the continuation of the business condition complained of, rather than to cure the same—we respectfully refer to the case of

Chamber of Commerce v. *Federal Trade Commission*, 13 F. (2nd) 673,

wherein the Circuit Court of Appeals for the Eighth Circuit said (at page 685):

> "As the orders of the Commission are purely remedial and preventative, the effect thereof is entirely in the future. Therefore, the jurisdiction of the Commission should in this respect be measured as of the time of the order rather than as of the filing of the complaint or as of the hearing thereon."

The foregoing authorities, in our opinion, completely answer the Commission's contention that in formulating its order in this case it had the power and authority to include therein provisions which, in its opinion, would restore competitive conditions and accomplish a return to the *status* which existed prior to December 30, 1916, the date upon which respondent acquired the capital stock of the Nevada Packing Company. By a properly framed order, requiring respondent to cease and desist from violating the provisions of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, and further requiring respondent to divest itself of the stock held by it in the Nevada Packing Company, and a bona fide compliance with that order upon the part of respondent, the Commission will have accomplished all that Congress ever intended by the Federal Trade Commission and Clayton Acts that it should accomplish, viz., *it will protect the public in the future from any alleged injury likely to result from the condition complained of.*

III.

THE ORDER IN THE ALUMINUM CASE POINTED TO BY THE COMMISSION AS A PRECEDENT FOR ITS ORDER IN THE INSTANT CASE DID NOT REQUIRE A DIVESTMENT OF ANYTHING OTHER THAN THE STOCK HELD.

Petitioner at page 17 of its brief refers to its order in

> *Aluminum Company* v. *Federal Trade Commission*, 284 F. 401,

as authority for its sweeping and destructive order in this case. In this connection, petitioner states

> "In the case of the *Aluminum Company* v. *Federal Trade Commission* (284 F. 401), the order therefor of the Commission was far reaching in its terms and forbade practically every conceivable means by which the Aluminum Company might evade its effect by *indirect acquisition of the* stock it was required to surrender."

The record in the Aluminum case, and, indeed the above quoted reference to the order therein, show that the Commission made no attempt whatever to order a divestment of anything other than the stock held by the Aluminum Company of America in Aluminum Rolling Mills Company. Furthermore, the form and scope of the order which the Federal Trade Commission may properly make under Section 11 of the Clayton Act was not in issue either before the Circuit Court of Appeals for the Third Circuit or before this court in the proceedings for *certiorari*.

IV.

THERE IS NO ANALOGY BETWEEN THE POWERS OF CIRCUIT COURTS UNDER THE SHERMAN ACT AND THE POWERS OF THE FEDERAL TRADE COMMISSION UNDER THE CLAYTON ACT.

After thus referring to its order in the Aluminum case as a precedent for its order in the case at bar, the Commission made a further endeavor to justify its order in this case by reference to the decrees made by our Federal Courts in the Standard Oil, American Tobacco, Union Pacific, Corn Products and Cement Securities cases, every one of which was a proceeding based upon a violation of the Sherman Anti-trust Act. Heretofore, in argument before the Circuit Court of Appeals, the Commission, when referring to the decrees rendered in the above mentioned cases, frankly admitted that the analogy "may not be perfect." But, now, in this honorable court of final appeal, the Commission claims that in a proceeding based upon a violation of the Clayton Act, it has exactly the same power and authority concerning the character and extent of its order as have Circuit Courts under the Sherman Act.

Nevertheless, the analogy still remains "imperfect." Proceedings based upon a violation of the Sherman Act are directly instituted in the Circuit Courts of the United States, and the proceedings are termed by the act itself: "Proceedings in Equity to Prevent and Restrain such Violations." The Sherman Act does not define or limit the character of order to be made by the court, but leaves the court, sitting in equity, to exercise its judicial discretion and enter a decree in keeping with the case presented to it. The decree, of course, to be valid must be such as would reasonably prevent and re-

strain the violation complained of. The Commission is not vested with any such authority under either the Clayton Act or the Federal Trade Commission Act. By the terms of those acts, the Commission is given certain definite authority, with express instructions as to the kind and character of the order to be entered. And under each act, the form of order prescribed by Congress is formulated to exactly meet and correct the specific trade practices which the act condemns. Plainly, then, there is no analogy whatever between the powers of Circuit Courts in proceedings based upon violations of the Sherman Act and the powers of the Federal Trade Commission in proceedings under the Clayton Act.

The Federal Trade Commission is not a court; it exercises administrative not judicial functions:

National Harness, etc., Assn. v. *Federal Trade Commission*, 268 Fed. 705.

Chamber of Commerce v. *Federal Trade Commission*, 280 Fed. 45.

Eastman Kodak Co. v. *Federal Trade Commission*, 7 F. (2nd) 994.

Despite its protestations to the contrary, the Commission has attempted to exercise judicial, as well as administrative, powers in this proceeding.

V.

IF SECTIONS 7 AND 11 OF THE CLAYTON ACT ARE CONSTRUED AND APPLIED ACCORDING TO THEIR PLAIN MEANING, NO CONSTITUTIONAL QUESTION ARISES.

The only provision of the constitution which authorizes Congress to declare unlawful the acquisition and ownership of capital stock of a private corporation or to justify a Federal statute, like the Clayton Act, ordering

that under certain circumstances the owner of such property "divest itself of the stock held" is that contained in Article 1, Section 8, reading:

> "* * * to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

Concerning the power of Congress to regulate commerce, Mr. Chief Justice Taft in

> *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456,

said (p. 478):

> "To regulate in the sense intended is to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to protect its growth and insure its safety" (citing cases).

Now in

> *U. S.* v. *Standard Oil Company*, 221 U. S. 1 (41-43),

Mr. Chief Justice White, in the course of his very exhaustive opinion, enumerated certain objectionable practices which, experience had demonstrated, had been variously employed to restrain trade, attain monopoly, and generally to obstruct the channels of interstate commerce. Among the trade practices there enumerated and condemned by the learned Chief Justice were the "holding Company" and "the operation of bogus independent companies."

In the Clayton Act, an anti-trust law supplemental to the Sherman Act, Congress legislated against practically all of the trade practices condemned by this court in the Standard Oil case. Section 7 of the Act is specifically directed against the "holding company" and "the bogus independent"; and in Section 11 of the Act, Congress hands to the Federal Trade Commission, an administra-

tive body, a definite and self-sufficient form of order to be issued to a corporation violating the intercorporate stockholding provisions of Section 7, viz.: an order to cease and desist from violating the provisions of Section 7 and to divest itself of the stock held.

Construed as an inhibition against the "bogus independent" and the "holding company," Section 7 of the Clayton Act, in our opinion, is constitutional, because it aims at correcting a trade practice condemned by the courts as a means or device variously employed by those seeking to restrain trade and obtain monopoly. As thus construed, there is nothing harsh, or unjust, or unreasonable, or arbitrary in the selection and classification. In our judgment, however, said Section 7 of the Clayton Act would be positively arbitrary and discriminatory, and therefore, unconstitutional if interpreted, as the Commission would have it interpreted, for the reason that it would constitute a regulation of the affairs of corporations, as distinguished from other "persons" without any justification for the arbitrary selection.

Mallinckrodt Chemical Works v. *Missouri*, 238 U. S. 41.

If the Commission's interpretation be given effect, the result must necessarily be that because of the provisions of Section 7 of the Clayton Act, "A," a corporation, and solely because it is such, is prohibited from acquiring the plant of "B," also a corporation through the medium of a stockholding transaction—leaving "C," who happens to be an individual or a co-partnership, entirely free to take over the plant of "B" through such medium without violating any law whatever. That such prohibition, as we view the law, would be arbitrary and discriminatory and make the act unconstitutional.

Corporations cannot be subjected, merely because they are corporations, to onerous requirements having no reasonable support in that fact.

Kentucky Finance Corp. v. *Paramount Auto Exchange*, 262 U. S. 544.

Southern Bell Telephone & Telegraph Co. v. *Town of Calhoun*, 287 Fed. 381.

Society of Sisters of the Holy Name v. *Pierce*, 296 Fed. 928. (Later affirmed by this Court in 268 U. S. 510.

But, after all, Congress in the Clayton Act has made no attempt to legislate against anything other than the judicially condemned intercorporate stockholding. Nothing is said in Section 7 of the Act as to any property other than stock—and in Section 11, the order prescribed by Congress is directed at nothing but stock. The specification of "stock" is in no uncertain terms and excludes, of course, everything else. It, therefore, appears that no constitutional question is involved in this case. Sections 7 and 11 of the Clayton Act are not, in our opinion, susceptible of any other construction than that which the Circuit Court of Appeals for the Ninth Circuit, placed upon them in and by its judgment modifying the order of the Commission in so far as that order would militate against the acquisition by respondent of the plant and physical properties of the Nevada Packing Company.

But, if this statute were susceptible of two constructions, by one of which grave and doubtful constitutional questions arise, and by the other of which such questions are avoided, the disposition of this Court would be, we take it, to adopt the latter.

Commodities Claim Cases, 213 U. S. 366.

Conclusion.

It is respectfully submitted that the order of the Circuit Court of Appeals for the Ninth Circuit modifying the order of the Commission in this case should be affirmed.

Sullivan, Sullivan and Theo. J. Roche,
Jeremiah F. Sullivan,
Edward I. Barry,
Frank L. Horton,
Attorneys for Respondent.